उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

24

मामला क्रमांक Cr.A.No. 12/2003 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

SB: HON'BLE SHRI DHIRENDRA MISHRA, J.

APPELLANT Peermal S/o Dhani Ram Lakada, aged about 23 years, R/o village Pathrai, P.S. Kamaleshwarpur, Distt. Surguja (C.G.

Vs.

RESPONDENT State of Chhattisgarh, through P.S. Kamaleshwarpur, Distt. Surguja (C.G.)

30-8-2007

Shri V.K. Pandey, Advocate for the appellant.

Shri Sushil Dubey, Addl. Public Prosecutor for the State.

2. The appellant has preferred this appeal against the judgment of conviction and order of sentence dated 14-6-2002 passed in S.T. No. 395/2001 whereby learned 1st Additional Sessions Judge, Ambikapur has convicted the appellant under Section 376(1) of the I.P.C. and sentenced him to undergo R.I. for 7 years with a fine of Rs. 1,000/-, in default of payment of fine, to further undergo additional R.I. for 6 months.

3. Allegation against the appellant is that on 4-8-2001 at about 8 p.m. while the prosecutrix had gone to attend the call of nature along with her sister Phulkunwari (P.W. 2), the appellant came there and forcibly dragged her to the house of Virendra and raped her. He repeated the crime twice in the night and thereafter went away at about 5-6 a.m. The prosecutrix did not go to her home and sat under a tree upto 3 p.m. on the following day, when her husband saw her, she narrated the incident to her sister and neighbours and also to her husband and thereafter report of Ex. P-1 was lodged on 6-8-2001 at 10.00 hrs. The prosecutrix was sent for medical examination where Dr. (Smt.) S. Shrivastava (P.W. 7) examined her and

GRPRJ — FS/246— 2/2007 — 50,000.

XI-HC—78

(25)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A.No. 12/2003 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

gave her report of Ex. P-9, no injury was found on the person of the prosecutrix and she opined that no definite opinion can be given about rape as the prosecutrix is habitual to sexual intercourse. After investigation, charge sheet was filed.

4. During trial, the prosecution examined 12 witnesses in all and thereafter statement of the accused was recorded. The appellant also examined Linus Ekka as D.W.1. Learned trial Court after hearing the counsel for the parties has convicted and sentenced the appellant as mentioned above.

5. Learned counsel for the appellant submits that conviction of the appellant is based on the statement of P.W. 1 the prosecutrix and her husband Nageshwar (P.W. 3). P.W. 2 Phulkunwari, sister of the prosecutrix who is stated to be present at the time of incident has not supported the case of the prosecution and has turned hostile. He further argues that from perusal of the evidence of the prosecutrix as also other witnesses, it is manifestly clear that the prosecutrix is a consenting party and the learned Trial Court has wrongly held that the appellant subjected the prosecutrix to sexual intercourse against her wishes. The finding of the trial Court is based on improper appreciation of evidence available on record and the same cannot be sustained.

6. On the other hand, learned counsel for the State has supported the impugned judgment.

7. I have heard learned counsel for the parties.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr. A. No. 12/2003 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

8. As per the case of the prosecution, the incident occurred on 4-8-2001 at about 8 p.m. in presence of Phulkunwari (P.W. 2), sister of the prosecutrix. It is alleged that the prosecutrix was subjected to sexual intercourse thrice in the intervening night of 4th and 5th August, 2001. The offence is alleged to have been committed in the house of Virendra however the owner of the house has not been examined.

9. The prosecutrix (P.W. 1) has stated that she is a resident of Jatga Katghora. She had gone to village Pathrai Menpat to earn her livelihood where she resided with her sister Phulkunwari and her husband. On the date of incident, she had gone to attend the call of nature with her sister where the accused caught her and took her to Pathrai Mission and raped her thrice in the night after throwing her on the ground and left the house in the morning. She has further stated that after returning she narrated the incident to her husband Kamil, thereafter they went to lodge the report on the same day, however the report was not recorded on that day and the report of Ex. P-1 was recorded on the following day. In para 10 of her cross-examination, this witness has stated that she knew Parimal however she never talked with him, her sister had gone away from there, she could not tell her sister that she is going with Parimal. The place Mission is some 1 km. away from the place where she was standing and both of them went there walking. They did not meet any one on way. However she has denied that they were talking properly on way or that she had herself taken out her clothes.

10. P.W. 2 Phulkunwari, sister of the prosecutrix has not supported the case of the prosecution and has turned hostile and has been cross-

(27)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक G.A.No. 12 / 2003 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

examined by the public prosecutor. She has stated that last year, the prosecutrix stayed in her house for a month and thereafter she went with Nageshwar. In cross-examination, she has denied the suggestion that the prosecutrix informed her that the accused has raped her in the night.

11. P.W. 3 Nageshwar, husband of the prosecutrix has stated that the prosecutrix resided with her and he has kept her as his wife. In the last year, on the eve of Raksha Bandhan, the prosecutrix was present in his house, in the evening Phulkunwari came there and took her for a walk whereupon she went with Phulkunwari. When the prosecutrix did not return late in the night, he went to enquire about her in the house of Phulkunwari. On the next day, when he asked the prosecutrix she told that Phulkunwari had taken her out on the pretext of answering the call of nature and there she left her, where Parimal came and forcibly took her to the Mission Colony and raped her. In para 5 of cross-examination, he has stated that his house and the house of Phulkunwari is adjacent. At about 7-8 p.m. the prosecutrix went from his house to the house of Phulkunwari from where the prosecutrix went with Parimal. At about 3.30 on the following day, the prosecutrix was sitting under the tree and she was not returning home out of his fear, however after some time, she returned in the home.

12. P.W. 7 Dr. (Smt.) S. Shrivastava who has examined the prosecutrix has stated that she had examined the prosecutrix on 7-8-2001 and did not notice any external injury on the person of the prosecutrix. After internal examination, she has opined that the prosecutrix was habitual to sexual

XI-HC—78

(28)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr. A. No. 12/2003 **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

intercourse and therefore, no definite opinion about sexual intercourse can be given.

13. If we examine the statement of prosecutrix and the statements of the other witnesses examined by the prosecution in support of its case, possibility of the prosecutrix being a consenting party to the act of sexual intercourse cannot be ruled out and the allegation of the prosecutrix that she was subjected to rape by the accused without her wishes does not inspire confidence and the trial Court was not justified in convicting the accused on the basis of the evidence of the prosecutrix and her husband.

14. In the result, the appeal is allowed. The impugned judgment of conviction and order of sentence are set aside. The appellant is acquitted of the charge under Section 376(1) of I.P.C. He be set at liberty forthwith if not required in any other case.

Sd/-
Dhirendra Mishra
Judge